2016

Larry Harmon, Petitioner-Appellant vs. Utah Board of Pardons and Parole, Respondent-Appellee

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

LARRY HARMON, Petitioner-Appellant, vs. UTAH BOARD OF PARDONS AND PAROLE, Respondent-Appellee.	No. 20160192-CA

BRIEF OF APPELLEE UTAH BOARD OF PARDONS AND PAROLE

On Appeal from the Third Judicial District Court
The Honorable Todd M. Shaughnessy presiding
Case No. 150903620

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ORAL ARGUMENT NOT REQUESTED

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STATEMENT OF JURISDICTION

The Court has jurisdiction to review the district court's final judgment under Utah Code section 78A-4-103(2)(g).

ISSUE PRESENTED

Did the district court err by dismissing Mr. Harmon's rule 65B petition for failure to state any claims upon which relief could be granted?

Preservation: The Appellee raised this issue in its motion to dismiss. Record (R.) 117-31.

Standard of review: The Court reviews a dismissal under rule 12(b)(6) for correctness. *Helf v. Chevron U.S.A., Inc.*, 2009 UT 11, ¶ 14, 203 P.3d 962.

DETERMATIVE PROVISIONS

Any determinative provisions are provided in the text of the brief.

STATEMENT OF THE CASE

Nature of the case: Mr. Harmon challenges the Board of Pardons and Parole's decision in 2008 refusing to grant him parole from his life sentence for murder.

Proceedings below: Several years after the Board decision, Mr. Harmon filed a petition for extraordinary relief in district court. Record (R.) 1-7. The Board moved to dismiss under Utah Rule of Civil Procedure 12(b)(6); Mr. Harmon filed a response to which the Board replied. R. 117-132, 178-184, R. 187-93.

Disposition: The trial court granted the Board's motion to dismiss because prior controlling decisions bar any claim upon which relief can be granted. R. 202-07.

STATEMENT OF THE FACTS

In 1995, Mr. Harmon shot two men; one died and the other was injured. *See State v. Harmon*, 956 P.2d 262, 264 (Utah 1998). A jury later found Mr. Harmon guilty of murder, a first degree felony, and attempted murder, a second degree felony. R. 134-38. In September, 1996, the district court sentenced Mr. Harmon to prison for indeterminate terms of five years to life for the Murder conviction, and one to fifteen years for the Attempted Murder conviction. R. 136-37. These sentences were to run concurrently. R. 136.[1]

Two months later, the Board of Pardons and Parole ("Board") scheduled an Original Hearing for Mr. Harmon to take place in September 2008. R. 140. In the meantime, he completed multiple training and rehabilitation programs and held various jobs while incarcerated. R. 31-42, 49-61, 65, 72, 147. He also unsuccessfully requested an earlier parole hearing and parole date. R. 145-47.

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[1] Mr. Harmon also received two one-year sentencing enhancements because both crimes were committed with a firearm. R. 136. The sentencing enhancements were to run consecutively to the other sentences. R. 136.

On September 2, 2008, Mr. Harmon appeared personally before the Board for his Original Hearing. Beforehand, he received his "blue packet" containing all of the records and materials the Board would rely upon when making its decision. R. 2-3. After reviewing the packet and conducting the Original Hearing, the Board determined Mr. Harmon would not receive a parole date but instead would expire his life sentence in prison. R. 150. The Board's decision meant Mr. Harmon would serve the maximum amount of time—life—to which he was sentenced for his crimes. R. 2, 136.

The Board also issued a Rationale for Decision sheet that specified aggravating and mitigating factors upon which the Board based its decision. R. 151. The Board found relevant the following aggravating factors: "Multiple incidents and/or victims," "Extent of the injury (physical, emotional, financial, social)," "Relatively vulnerable victim vs. aggressive or provoking victim," and "Denial or minimization vs. complete acceptance of responsibility." R. 151 (emphasis in original). By underlying "minimization," the Board appears to have put special emphasis on that factor. R. 151. On the other hand, the Board found relevant the following mitigating factors: "Programming (effort to enroll, nature of programing)," and "Disciplinary problems or other defiance of authority." R. 151. The Board left other potentially relevant aggravating and mitigating factors unchecked, including

"Use of weapons or dangerous instrumentalities," and "[Lack of] [p]ersonal gain reaped from the offense." R. 151.

In 2015, Mr. Harmon filed a rule 65B petition for extraordinary relief in district court claiming the Board's 2008 decision violated fundamental fairness, due process, cruel and unusual punishment, double jeopardy, and that Utah's sentencing scheme was unconstitutional. R. 5-6. The Board moved to dismiss the petition for failure to state any claims upon which relief could be granted. R. 119-32. In essence, the Board argued that Mr. Harmon had failed to allege any facts supporting his claims or the facts he did allege failed to state viable claims as a matter of law. *Id.* The trial court agreed and dismissed the petition under rule 12(b)(6). R. 202-07. Mr. Harmon timely filed this appeal. R. 219.

SUMMARY OF THE ARGUMENTS

Rule 12(b)(6) authorizes dismissal when, as a matter of law, a complaint fails to state any claims upon which relief may be granted. The district court correctly applied that standard to Mr. Harmon's petition and dismissed his claims.

Mr. Harmon first argues that the Board's rationale sheet did not adequately advise him of the Board's reasoning. But the Supreme Court has already held that the Board's rationale sheets are adequate. At most, Mr.

Harmon's arguments about the factors the Board did or did not consider go to the substance of the Board's decision, which the Court cannot review.

Similarly, Mr. Harmon argues that the Board should have advised him of his ability to hire counsel for his parole hearing. But he has no constitutional right to counsel at a parole hearing, nor has he identified any authority requiring the Board to advise him of his ability to hire his own attorney. Case law suggests no such right exists.

Finally, Mr. Harmon argues without much analysis that the Board's decision was arbitrary or capricious. But case law squarely holds that absent unusual circumstances, a Board's parole determination is not arbitrary or capricious as long as it falls within the indeterminate sentence imposed by the district court. Here, the Board decided simply that Mr. Harmon would serve the full amount of his life sentence. To the extent he argues that his good behavior in prison constitutes "unusual circumstances," that argument has also already been rejected by Utah courts.

In short, Mr. Harmon's claims and supporting allegations fail to state claims upon which relief could be granted as a matter of settled precedent. The district court therefore appropriately dismissed the petition.

STANDARD OF REVIEW

The propriety of a dismissal under rule 12(b)(6) presents a question of law reviewed for correctness. *Helf*, 2009 UT 11, ¶ 14. The Court must "accept the material allegations in the [petition] as true and interpret those facts and all reasonable inferences drawn therefrom in a light most favorable to the plaintiff as the non-moving party." *Moss v. Pete Suazo Utah Athletic Comm'n*, 2007 UT 99, ¶ 8, 175 P.3d 1042. But the Court need not countenance mere legal conclusions or conclusory fact allegations unsupported by recitation of any relevant supporting facts. *Commonwealth Prop. Advocates, LLC v. Mortg. Elec. Registration Sys., Inc.*, 2011 UT App 232, ¶ 16, 263 P.3d 397.

The Board's decisions are generally not subject to judicial review. Utah Code § 77-27-5(3). However, courts may use an extraordinary writ to review the Board's decisions in two narrow circumstances: to correct "a gross and flagrant abuse of discretion," *Renn v. Utah State Bd. of Pardons*, 904 P.2d 677, 683 (Utah 1995), and to assure that procedural due process was not denied, *Labrum v. Utah State Bd. of Pardons*, 870 P.2d 902, 909-13 (Utah 1993).

Importantly, judicial review of Board decisions considers only "the fairness of the *process* by which the Board undertakes its sentencing function," not the result. *Padilla v. Utah Bd. of Pardons & Parole*, 947 P.2d

664, 667 (Utah 1997) (internal quotation marks omitted). The Board has exclusive authority to determine the actual number of years a defendant serves within his sentence, *Preece v. House*, 886 P.2d 508, 512 (Utah 1994), and the court does not "sit as a panel of review on the result, absent some other constitutional claim." *Lancaster v. Utah Bd. of Pardons*, 869 P.2d 945, 947 (Utah 1994).

ARGUMENT

The district court properly dismissed Mr. Harmon's petition for failure to state a claim. The court used the correct rule 12(b)(6) analysis to dismiss the claims. As a matter of settled precedent, Mr. Harmon's allegations about the rationale sheet, an alleged right to be advised to seek his own counsel, and fundamental fairness, do not state a claim upon which his requested relief—reversal of the Board's decision—could be granted.

I. The District Court Applied The Right Standard Under Rule 12(B)(6) And Properly Dismissed The Petition.

Mr. Harmon first argues generally that the petition alleges enough facts to survive a rule 12(b)(6) motion, but the district court "ignored the facts." Aplt. Br. at 10.[2] But he doesn't specify which facts were allegedly

[2] Mr. Harmon also argues that his claims need only be "plausible" under *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) to survive dismissal. Aplt. Br. at 9. But Utah hasn't adopted the "heightened plausibility standard for pleadings" required under the federal procedure rules. *See, e.g., Am. W. Bank Member, L.C. v. State*, 2014 UT 49, ¶ 13 n.22, 342 P.3d 224. At any rate, because Mr.

ignored nor how those facts state a viable claim undermining the Board's decision. He has therefore failed to show any district court error on this point. Nor can he foist his burden of persuasion onto the Court or the Board to review the petition looking for any redressable allegations that he did not raise himself.

Moreover, it is readily apparent that the district court correctly dismissed Mr. Harmon's petition because settled law precludes any relief based on the few facts alleged in Mr. Harmon's petition. When considering a 12(b)(6) motion, the court's "inquiry is concerned solely with the sufficiency of the pleadings, and not the underlying merits of the case." *State v. Apotex Corp.*, 2012 UT 36, ¶ 42, 282 P.3d 66. Thus, dismissal is appropriate when it is "apparent that as a matter of law, the plaintiff could not recover under the facts alleged." *Lowe v. Sorenson Research Co.*, 779 P.2d 668, 669 (Utah 1989). As indicated below, the district court properly concluded that Mr. Harmon could not recover under the facts alleged in his petition.

II. The District Court Properly Rejected Mr. Harmon's Due Process Claims.

The petition shows the Board provided Mr. Harmon the requisite procedural due process under Utah law. As a general matter, "[t]he Board must satisfy two due process requirements in conducting parole hearings.

Harmon's petition does not satisfy Utah's traditional rule 12(b)(6) standards, the petition could not satisfy the heightened plausibility standard.

First, 'an inmate must receive adequate notice to prepare for a parole hearing.' Second, the inmate must 'receive copies or a summary of the information in the Board's file upon which the Board will rely.'" *Stewart v. Bd. of Pardons & Parole*, 2015 UT App 246, ¶ 6, 360 P.3d 800 (quoting *Peterson v. Utah Bd. of Pardons*, 931 P.2d 147 (Utah Ct. App. 1997)). The Board is not required to provide inmates any additional information or procedures. *Peterson*, 931 P.2d at 150.

Here, the Petition states that Mr. Harmon was incarcerated in 1996 and received an Original Hearing before the Board on September 2, 2008. R. 2-3. The Petition also states that "Mr. Harmon was provided a 'blue packet'" which was "the information contained in the Board's file on an inmate of which the Board intends to rely during its decision-making process." R. 4. Mr. Harmon's petition did not allege the "blue packet" was lacking information or that the Board considered information outside of the packet materials, nor did the Petition allege Mr. Harmon failed to receive adequate notice to prepare for the Board hearing. Thus, under Utah law, Mr. Harmon has not alleged facts showing violation of procedural due process in the Board hearing.

A. The Board's rationale sheet is constitutionally adequate.

Mr. Harmon asserts the Board failed to provide him a constitutionally adequate rationale for its decision. Aplt's Br. at 10-11. To his credit, he

acknowledges that the Board's rationale sheets have already been found to satisfy constitutional requirements. *Id.* at 10; *Padilla*, 947 P.2d at 669-70 ("[R]ationale sheets used by the Board . . . were adequate and did not deprive [the defendant] of due process."). And he does not dispute the fact that he received a rationale sheet explaining the Board's decision. R. 151. Accordingly, the Board provided Mr. Harmon a constitutionally adequate rationale for its decision as a matter of law.

Nonetheless, he suggests that *Padilla* is old and much has changed. Aplt. Br. at 10. But that provides no basis for this Court to deviate from binding precedent. Mr. Harmon's real complaint seems to be that the Board's rationale sheet did not check off all of the mitigating factors he thinks apply. Aplt. Br. at 10-11. The Court, however, can only review the "fairness of process" in the Board's decision, not the "substance." *Padilla*, 947 P.2d at 667; *see also Renn*, 904 P.2d at 684 ("[T]he substance of the Board's decision is not reviewable by an extraordinary writ except perhaps in an extreme case."). Accordingly, the Court has previously held that it will not review arguments about the rationale sheet factors the Board considered because they go to the substance of the Board's decision, not the procedural fairness. *Stack v. State Bd. of Pardons & Parole*, 2001 UT App 280. That precedent means Mr. Harmon's allegations do not state a claim as a matter of law and were properly dismissed by the district court.

Further, even if the court could examine the substance of the rationale sheet, the Board's marks, or absence thereof, were in no way arbitrary or unfair. Although Mr. Harmon argues that he qualified for several unchecked mitigating factors, Aplt's Br. at 10, he fails to acknowledge other aggravating factors the Board could have but did not mark (e.g., "Use of weapons or dangerous instrumentalities"). R. 151. The Board therefore did not, as Mr. Harmon suggests, merely exclude mitigating factors that might favor Mr. Harmon, but also excluded one or more aggravating factors that disfavor him.

Moreover, the premise of Mr. Harmon's argument is unfounded. It's wrong to presume—as Mr. Harmon's argument necessarily does—that the Board's discretion whether to parole someone is simply a matter of determining whether there are more mitigating than aggravating factors. In reality, different factors (aggravating and mitigating) will matter more than others in general, and various factors may weigh more in specific cases. For example, the Board placed particular emphasis on Mr. Harmon's minimization of his actions as opposed to completely accepting responsibility. R. 151.

The rationale sheet reflects a fair and calculated decision in which the Board marked the factors that were most influential in its decision-making process. Mr. Harmon has no viable due process claim that the Board's decision was procedurally or substantively unfair.

B. Mr. Harmon has no right to counsel nor a right to be advised of his ability to obtain his own counsel at a parole hearing.

Mr. Harmon also argues the Board violated his due process rights by failing to "advise" him of "his right to seek private counsel." Aplt's Br. at 11-12. But he fails to point to any authority that requires the Board to do so. Instead, he relies upon *Neel v. Holden* and the Sixth Amendment for support—neither of which suport his assertion.

In *Neel v. Holden*, the Utah Supreme Court reiterated that "there is no constitutional right to counsel in" a parole revocation hearing. 886 P.2d 1097, 1104 (Utah 1994). Nowhere in the *Neel* opinion does the Court suggest the existence of a right to be advised of the ability to seek counsel in any parole hearing. *Id.* Notably, the Court refused to find "that Neel was denied due process by the Board's refusal to allow Neel's counsel to address the Board." *Id.* at 1103. If anything, *Neel* illustrates the court's unwillingness to find any ancillary right associated with counsel when an inmate has no constitutional or statutory right to counsel in the first place.

Furthermore, analogous Utah case law contradicts Mr. Harmon's right-to-be-advised argument. The Utah Supreme Court summarily rejected a similar argument that an inmate was not advised of his right to counsel at a parole revocation hearing. *Folkes v. Turner*, 449 P.2d 649, 649 (Utah 1969). The Court simply noted that the inmate "was not entitled" to counsel in the

first place. *Id.* Similarly, because Mr. Harmon is not entitled to counsel here, the Board had no due process duty to advise him that he could obtain his own counsel.

Likewise, Mr. Harmon's reliance on the Sixth Amendment of the United States Constitution is misplaced. The Sixth Amendment does not grant a right to be advised of counsel at a Board hearing because it applies only to "criminal prosecutions." *Neel*, 886 P.2d at 1103; U.S. CONST. amend VI. And the Original Hearing was not a "criminal prosecution." *See, e.g., Neel,* 886 P.2d at 1103 (quoting *Morrissey v. Brewer*, 408 U.S. 471, 480 (1972) ("'the revocation of parole is not a part of the criminal prosecution and thus the full panoply of rights due a defendant in such a proceeding does not apply.")).

In sum, the district court did not err in dismissing Mr. Harmon's due process claims because, as a matter of law, they did not state actual due process violations.

II. A Board Decision Cannot Be Arbitrary Or Capricious When It Falls Within The Indeterminate Sentencing Range.

Lastly, Mr. Harmon claims that the Board acted arbitrarily and capriciously when it determined Mr. Harmon would finish out his life sentence in prison. Aplt. Br. at 12-13. But, again, Utah law clearly contradicts his assertion.

Generally, the Board cannot abuse its discretion regarding parole decisions if the Board's decision falls within the indeterminate sentencing range imposed by the trial judge. *Preece*, 886 P.2d at 512 ("[S]o long as the period of incarceration decided upon by the board of pardons falls within an inmate's applicable indeterminate range, e.g. five years to life, then that decision, absent unusual circumstances, cannot be arbitrary and capricious."); *see also McCammon v. Bd. of Pardons & Parole,* 2016 UT App 119, ¶ 4, 378 P.3d 106 (quoting *Padilla*, 947 P.2d at 669) ("In setting or denying parole, 'the Board merely exercises its constitutional authority to commute or terminate an indeterminate sentence that, but for the Board's discretion, would run until the maximum period is reached.'")).

Mr. Harmon's petition stated that he "is currently serving a 5-to-life sentence for Murder." R. 2. The petition also states that the Board decided on the "maximum period" of Mr. Harmon's indeterminate sentence—life sentence. R. 4. Because the Board's decision "falls within [Mr. Harmon's] applicable indeterminate range," the Board's decision cannot be arbitrary or capricious. *Preece*, 886 P.2d at 512. Thus, the district court did not err in dismissing the petition.

Although not argued in his brief, Mr. Harmon might be suggesting that his case satisfies the "unusual circumstances" exception mentioned in *Preece.* By listing Mr. Harmon's completion of training, rehabilitation and

educational programs, his employment within the prison, and a letter from Sherriff Phillips urging the Board to grant a parole hearing, Mr. Harmon may be trying to suggest that his status as a "model inmate" creates an "unusual circumstance" baring the Board from letting him serve the maximum period within his indeterminate range. Aplt. Br. at 8 and attachments to brief. However, the Utah Supreme Court expressly rejected this identical argument. In *Padilla*, an inmate argued his situation constituted "unusual circumstances" because both "the rationale sheets used by the Board were insufficient" and the inmate "ha[d] been an 'exemplary inmate' since his incarceration." *Padilla*, 947 P.2d at 671. The Utah Supreme Court dismissed the inmate's claims stating that "these do not constitute sufficiently unusual circumstances to justify review of the Board's substantive decision." *Id.* Mr. Harmon's implied argument mirrors *Padilla* and must also be rejected.

Moreover, Mr. Harmon has no constitutional right to parole. It is well established that parole "is a privilege, an act of grace, as distinguished from a right," and therefore no constitutional protection applies to an inmate's expectation of parole. *Ward v. Smith*, 573 P.2d 781, 782 (Utah 1978). Here, Mr. Harmon never had a right to parole, and any expectation he had thereof was contrary to law.

The district court did not err in its dismissal because the Board's decision fell within the indeterminate sentencing range, no unusual circumstances existed, and Mr. Harmon had no right to parole.

CONCLUSION

For the foregoing reasons, the Court should affirm the district court's decision granting the Board's motion and dismissing Mr. Harmon's Petition for Extraordinary Relief.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the total type-volume limitations of Utah Rule of Appellate Procedure 24(f)(1) because:

   - this brief contains 3,426 words, excluding the parts of the brief exempted by Rule 24(f)(1)(B).

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s/ Stanford Purser
Stanford Purser

CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of December, 2016, a true, correct and complete copy of the foregoing Brief of Appellee was filed with the court and served via United States mail and/or electronic mail as follows:

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